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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JANE L. SHADE, Plaintiff and Appellant, v. ANTHONY RACKAUCKAS et al., Defendants and Respondents.	G032755 (Super. Ct. No. 02CC13253) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Philip H. Hickok, Judge (sitting by appointment as an Orange County judge). Reversed.

Law Office of Jan J. Nolan and Jan J. Nolan for Plaintiff and Appellant.

Lynberg & Watkins, Norman J. Watkins, Ric C. Ottaiano, Richard T. Woods, and Courtney Hilton for Defendants and Respondents.

* * *

Jane L. Shade, a former Senior Deputy District Attorney for the County of Orange, was transferred to a civil division of the District Attorney's office, resulting in her eventual reclassification as an Assistant Department Counsel. Shade filed a petition for writ of mandate in the superior court, claiming Anthony Rackauckas, the District Attorney, transferred her in retaliation because she actively campaigned against his reelection; she sought an order compelling Rackauckas to reinstate her as a deputy district attorney. The petition was denied. On appeal, Shade contends Rackauckas violated her employment contract rights and infringed on her right to free speech under the First Amendment of the United States Constitution.

Rackauckas has broad managerial discretion to transfer deputy district attorneys among the various departments in his office, even if such a transfer results in a position reclassification. But that discretion may not be exercised solely in retaliation for activities protected by the First Amendment. Shade made a prima facie showing that Rackauckas transferred her to the civil division, knowing she would no longer be classified as a deputy district attorney within a few months, in retaliation for her support of his political opponent. Although given the opportunity to do so, Rackauckas offered no facts to rebut Shade's showing. Accordingly, we reverse the judgment of the trial court and remand with directions to issue the writ.

FACTS

When Rackauckas was elected as District Attorney in 1999, Shade was employed as a Deputy District Attorney V, having been with the District Attorney's office since 1985. Rackauckas appointed Shade as a member of his executive management staff and gave her the title of "Assistant District Attorney." As a condition of her appointment, Shade signed a waiver of her right to be demoted only for good cause and agreed to serve in that position at the discretion of Rackauckas. "I agree that I may be released from this position at any time without notice, cause or rights of

appeal . . . [but] if I am released from the position of Executive Manager without cause being stated and a hearing being granted, I shall have a right to return to a Deputy District Attorney V . . . position. If that class has been deleted or is no longer budgeted, I shall have the right to return to a non-executive management position in my occupational series closest to, but no higher than, the salary range of the Deputy District Attorney V class."

Rackauckas ran for reelection in 2002. Shade and several other deputy district attorneys actively campaigned against him, throwing their support behind his challenger, Wallace Wade, a fellow deputy district attorney. Shade endorsed Wade and authorized the use of her name as a supporter. She and her husband hosted fundraising events and meetings and contributed financially to the campaign. Openly critical of Rackauckas's performance in office, Shade spoke on Wade's behalf, enlisted endorsements for him, and distributed campaign literature attacking Rackauckas. None of Shade's activities in support of Wade were carried out during office hours.

Rackauckas was reelected on March 5, 2002. The next morning, Shade was given a memo from him demoting her from Assistant District Attorney to Senior Deputy District Attorney[1] and immediately reassigning her to the Family Support Division. Shade knew that the Legislature had enacted provisions to make the Family Support Division an entity separate from the District Attorney's office in July 2002, and she expressed her concern about being forced to leave the position of Deputy District Attorney. She asked Rackauckas for assurances that she would "remain in the District Attorney's Office and be moved out of the Family Support Division prior to the time it is taken over by the state agency." Rackauckas did not respond.

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[1] The office had been reorganized since 1999 and the classification of Deputy District Attorney V no longer existed. Pursuant to the terms of the waiver, she was demoted to the closest existing classification, which was Senior Deputy District Attorney.

Along with Shade, Rackauckas transferred his former opponent and several other deputy district attorneys who had actively campaigned against him to the Family Support Division. These transfers were not in accordance with the normal rotation schedule, which occurred twice a year and involved three months of information gathering and meetings. The next rotation announcement was scheduled for March 22, 2002; the scheduled rotations were to take effect on April 5.

None of the transferred deputy district attorneys had any experience in civil enforcement of support orders, and deputies experienced in family support were transferred out of the division to make room for them. Shade's new supervisor was obviously surprised by this abrupt personnel action, and when she and some of the other transferees met with him, "[h]e told us that he was sorry for the circumstances that brought us to FSD. . . . He advised us to take our time packing our belongings at our former offices and completing any duties we had there because he didn't have anything for us to do."

In April, Shade and several of her fellow transferees filed a complaint for injunctive and declaratory relief in the Orange County Superior Court. As part of the relief sought, the plaintiffs asked for a preliminary injunction returning them to positions in the criminal division of the District Attorney's Office. The case was transferred to Los Angeles County Superior Court Judge David P. Yaffe, who denied the preliminary injunction. He found that "plaintiffs fail to show that they are likely to prevail in proving that they were retaliated against for speaking out, as members of the public, on matters of public concern, rather than to advance their own private interests. It is as likely as not that plaintiffs favor the replacement of their old boss with a new one because they feel that the change would enhance their careers, and that they . . . are attempting to use the constitution to protect their right to do [so]."

On July 1, 2002, the Family Support Division of the District Attorney's Office became a new county Department of Child Support Services, and Shade was reclassified as an Assistant Department Counsel. In August, she filed this petition for writ of mandate in the Orange County Superior Court.

Shade alleged she was hired by the County of Orange to serve in the position classification of Deputy District Attorney. In the Memorandum of Understanding between the Orange County Attorneys Association and the County, the County did not reserve the authority to unilaterally reclassify her as a Deputy Public Defender, a Deputy County Counsel, or an Assistant Department Counsel with the Department of Child Support Services. She claimed the legislation that created the new department did not mandate such a unilateral reclassification. Shade alternatively alleged that if Rackauckas had the discretion to reclassify her, his exercise of that discretion was arbitrary and capricious and in retaliation for the exercise of her First Amendment rights.

In response, Rackauckas claimed Shade failed to demonstrate his retaliatory motive and, in any event, her speech was not protected because it related to a personal interest rather than a matter of public concern. Rackauckas' declaration explained that "[t]he Family Support Division was the District Attorney's Office [*sic*] largest civil division. Deputy District Attorneys are expected to work in both civil and criminal areas of the Orange County District Attorney's Office." When rotating attorneys to different positions, he "take[s] into consideration each deputy's potential for continued success . . . ." Shade's transfer to the Family Support Division was made "to promote the policy of efficiently operating the office in the best interest of the people of the State of California and the citizens of Orange County." Rackauckas denied that the transfer was made in retaliation for "off-duty protected political speech . . . ."

The court found that the transfer of Shade into the Family Support Division was a proper exercise of discretion by Rackauckas. "It's reasonable to accord elected

officials great latitude in how they operate their department, who they have in various positions. . . . Without this latitude, without this authority, I don't think the elected official can properly discharge [his] duties." The court then found that Rackauckas' decision to leave Shade in the Family Support Division rather than transferring her back to the criminal division was not an abuse of discretion. "Why should he fight to keep an employee in his office who has worked against him in the election? It's not that it's retaliation, it's not punishment, it's just that in order to fulfill his job description, his duties to his constituents, he has to surround himself with people that are best able to work with him and work for him. And Ms. Shade was not being punished, she was just merely being reassigned. It just happens that as of July 2nd she was working for the county of Orange in a different department. [¶] Mandate lies to compel a public official to exercise his or her discretion, it does not lie to require the official to exercise it in a particular way."

DISCUSSION

I. Statutory Background

In 1999, the Legislature created a new state agency for child support enforcement, the Department of Child Support Services, and authorized the Governor to appoint a director. Previously, the state agency designated to administer the child support program was the Department of Social Services, which was involved in many other programs; enforcement was delegated to the local district attorneys of the 58 counties. "[W]hile California has some of the strongest enforcement laws on the books, its fragmented, decentralized program structure, with day-to-day operations contracted from DSS to the 58 district attorneys, has kept California at the bottom of the country in collections." Meaningful reforms were impossible under the former system "due to the control and political power of the 58 district[] attorneys who do not wish to modify their

local programs." (Sen. Com. On Judiciary, Analysis of Assem. Bill No. 196 (1999-2000 Reg. Sess.) as amended May 18, 1999, pp. 9-10.)

The 1999 legislation set forth the Legislature's concerns: "The lack of coordination and integration between state and local child support agencies has been a major impediment to getting support to the children of this state. . . . [¶] The state would benefit by centralizing its obligation to hold counties responsible for collecting support. . . . [¶] A single state agency for child support enforcement with strong leadership and direct accountability for local child support agencies will benefit the taxpayers of the state by reducing the inefficiencies introduced by involving multiple layers of government in child support enforcement operations." (Fam. Code, § 17303.)

Each county was directed to establish a new county department of child support services, "separate and independent from any other county department . . . ." (§ 17304.) The Director was instructed to "create a program that builds on existing staff and facilities to the fullest extent possible," seeking to "minimize the disruption of services provided and to capitalize on the expertise of employees . . . ." To that end, "[a]ll assets of the family support division in the district attorney's office shall become assets of the local child support agency." (§ 17304, subd. (d).) Furthermore, "[a]ll employees and other personnel who serve the office of the district attorney and perform child support collection and enforcement activities shall become the employees and other personnel of the county child support agency . . . ." (§ 17304, subd. (e)(1)(A).)

Shade contends the legislation does not mandate the involuntary reclassification of career prosecutors who happened to be assigned to the family support division of the district attorney's office on the transition date, which was July 1, 2002 for Orange County. Furthermore, she claims she has a property interest in continued employment as a Deputy District Attorney through mutual understanding (*Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564.), and if the statute requires her

involuntary reclassification, it is unconstitutional as violating the guaranty against impairment of contracts. (U.S. Const., art. I, § 10.)

We need not reach the statutory questions to resolve this case. Rackauckas abused his discretion when he transferred Shade to the Family Support Division in retaliation for activities protected by the First Amendment, and it is this abuse that we correct. Had Shade been properly transferred to the Family Support Division, the impact of the statute on her would be a legitimate issue. But she was not.

II. Mandate is appropriate to challenge an abuse of discretion.

Rackauckas contends the appeal should be dismissed because a proceeding in mandate is not the proper vehicle for Shade's requested relief. He points out that an elected official has wide latitude to manage personnel and make internal employment decisions and contends that Shade's transfer to the Family Support Division was a permissible exercise of his discretion.[2]

Traditional mandamus may be used "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person." (Code Civ. Proc., § 1085, subd. (a).) "Although traditional mandamus will not lie to control the discretion of a public official or agency, that is, to force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion, and it will lie to force a particular action by the . . . official, when the law clearly establishes the petitioner's right to such action." (*Miller Family Home,*

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[2] Although Rackauckas objected to mandamus below, the trial court ruled on the merits of the petition rather than dismissing it. Rackauckas has not preserved this claim of error in this court because he did not file a cross-appeal. (*Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 758, fn. 9; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1997) ¶ 8:195, p. 8-102.)

Inc. v. Department of Social Services (1997) 57 Cal.App.4th 488, 491, internal quotations omitted.)

Shade's petition is based on allegations that Rackauckas abused his discretion by exercising it in a way that deprived her of the constitutional guaranties under the First Amendment. Traditional mandamus is properly used to address such allegations. (See, e.g., *Price v. Civil Service Com.* (1980) 26 Cal.3d 257; *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771.)

We review the trial court's judgment on a petition for traditional mandate by applying the substantial evidence test to its factual findings and using our independent judgment on legal questions. (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995-996.) The trial court made a factual finding that Rackauckas's motive in transferring Shade was not retaliatory; as we discuss *infra*, that finding is not supported by substantial evidence and cannot be upheld.

III. First Amendment Violation

"[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." (*Connick v. Myers* (1983) 103 S.Ct. 1684, 1686.) Constitutional protection remains in place even if the topic of public interest involves speaking out against one's employer. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions . . . ." (*Waters v. Churchill* (1994) 114 S.Ct. 1878, 1887 (plur. opn. of O'Connor, J.).) But the government has an interest in regulating the speech of its employees in order to "promot[e] the efficiency of the public services it performs through its employees." (*Pickering v. Board of Ed. of TP High School Dist. 205* (1968) 88 S.Ct. 1731, 1735.) The problem is striking a balance between these competing interests. (*Ibid.*)

A. Shade's speech concerned a matter of public interest.

Rackauckas argues Shade's speech was motivated by her personal career interests rather than the public interest; thus, it does not come within constitutional protection. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." (*Connick v. Myers*, *supra*, 103 S.Ct. at p. 1690.) *Connick*, the seminal case on the issue of public speech, involved an assistant district attorney in New Orleans who faced a transfer to a different section of the criminal court, which she strongly opposed. After expressing dismay to her supervisor, she prepared and distributed a questionnaire "soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." (*Id.* at p. 1686.) She was discharged for refusing to accept the transfer and distributing the questionnaire; she sued under the Civil Rights Act (42 U.S.C. § 1983), contending her employment was wrongfully terminated for exercising her right to free speech.

Excepting the question about pressure to work on political campaigns, the court found Myers' questionnaire related to her dissatisfaction with her transfer. "Myers did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." (*Connick v. Myers*, *supra*, 103 S.Ct. at pp. 1690-1691.) The court felt differently about pressure to work on political campaigns, however. "We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in

violation of fundamental constitutional rights. [Citations.] In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service. [Citation.]" (*Id.* at p. 1691.)

When we compare Shade's political activities to Myers' questionnaire, it is clear that Shade's activities were about matters of public interest and entitled to constitutional protection. In the context of a political campaign, she spoke out against Rackauckas' integrity and work habits, and she disclosed what she believed to be the preferential treatment he afforded those who donated to his campaign. Her activities were designed to influence public opinion and were all conducted in public forums. "Speech that concerns issues about which information is needed or appropriate to enable the members of the public to make informed decisions about the operation of their government merits the highest degree of first amendment protection . . . ." (*McKinley v. City of Eloy* (9th Cir.1983) 705 F.2d 1110, 1114.)

Rackauckas points to Judge Yaffe's finding that "[i]t is as likely as not that plaintiffs favor the replacement of their old boss with a new one because they feel that the change would enhance their careers . . . ." But whether Shade's clearly public activities included a private interest does not diminish the relevance of her speech to the public's evaluation of Rackauckas' performance. "The First Amendment protects not only the individual's interest in speaking out but also the public's interest in being informed." (*Chico Police Officers' Assn. v. City of Chico* (1991) 232 Cal.App.3d 635, 646.)

B. Shade made a prima facie case of retaliation that was not rebutted by Rackauckas.

Having found Shade's political activities constituted protected speech, we now consider whether her transfer to the Family Support Division was punishment for that speech. In the trial court, Rackauckas denied any retaliatory motive, and Judge Hickok agreed. But in our view, Shade made a prima facie case of retaliation that was not rebutted by Rackauckas.

Once a government employee has established activity protected by the First Amendment, he or she must then show the protected conduct was a "motivating factor" in the denial of a benefit. (*Mt. Healthy City School Dist. Bd. of Educ. v. Doyle* (1977) 97 S.Ct. 568, 576.) The uncontradicted facts presented by Shade compel the initial conclusion that Rackauckas transferred her to the family support division as a punishment for her political activities: She and several other deputy district attorneys received the memo transferring them within hours of the election results. The transfer was not within the normal rotation period of assignments, which was only weeks away. Shade had no experience in the Family Support Division, and there were no vacancies there. In fact, experienced attorneys had to be transferred out to make room for Shade and her colleagues. Rackauckas did not explain his action to the transferred deputies. And he knew that the Family Support Division would be severed from the District Attorney's office in less than four months.

When an employee carries the initial burden of showing her speech was constitutionally protected and her conduct was a motivating factor for the adverse employment action, the burden shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." (*Mt. Healthy City School District v. Doyle*, *supra*, 97 S.Ct. at p. 576.) Rackauckas asserted in his declaration that Shade's transfer was effected "to promote the policy of efficiently operating the office in the best interest of the people of the State of California and the citizens of Orange County." He presented no facts to explain how Shade's transfer would promote the goal of efficiency. In light of the strong inferences from the undisputed facts presented by Shade, this conclusory statement is insufficient as a matter of law to rebut the prima facie showing that the transfer was made because of Shade's political activities.

Rackauckas argues even if he transferred Shade because of her protected activity, he was justified in doing so to avoid disruption in his office and preserve his authority. Rackauckas is correct that adverse action against a government employee because of protected speech may be justified by "the government's interest in the effective and efficient fulfillment of its responsibilities to the public. . . . [¶] To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.'" (*Connick v. Myers*, *supra*, 103 S.Ct. at p. 1692, quoting *Arnett v. Kennedy* (1974) 94 S.Ct. 1633, 1651.) Rather than laying down a general standard, the Supreme Court requires the courts to conduct a fact-intensive balancing process of the government's interest and the employee's interest in free speech. (*Pickering v. Board of Education*, *supra*, 88 S.Ct. at pp. 1734-1735.)

"In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." (*Rankin v. McPherson* (1987) 107 S.Ct. 2891, 2899.) Because Shade's protected activity was her open support of a political candidate, thus involving a matter of substantial public interest, Rackauckas must make a strong showing to counterbalance her free speech interest. (*Connick v. Myers*, *supra*, 103 S.Ct. at pp. 1692-1693, fn. 12.) "[P]ertinent considerations [are] whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." (*Rankin v. McPherson*, *supra*, 107 S.Ct. at p. 2899.)

There is some disagreement about whether the government must show that the protected speech actually disrupted the office or merely that it was likely to do so. (*Kirchmann v. Lake Elsinore Unified School Dist.* (1997) 57 Cal.App.4th 595; *Gray v. County of Tulare* (1995) 32 Cal.App.4th 1079, 1092.) Here, however, there was a complete absence of any evidence on the issue. Other than his conclusory statement that Shade's transfer was for the good of the people, Rackauckas offered no justification, legitimate or otherwise, for the exercise of his discretion. And the timing of Shade's transfer belie Rackauckas' contention that she jeopardized the efficient administration of his office. Shade's activities in support of his opponent continued for months during the campaign, but it was not until the election results were in that he transferred her to the Family Support Division.

C. Shade was not a policymaker in the position of Senior Deputy District Attorney.

Rackauckas argues the *Pickering* balancing test is inapplicable to this case because Shade's position as an Assistant District Attorney made her a policymaker, which allowed him to transfer her for purely political reasons without offending the First Amendment. We agree that as an at-will member of Rackaucas' executive management staff, Shade was undoubtedly a policymaker. But once she was demoted to Senior Deputy District Attorney, she no longer retained that status.

The so-called policymaker exception had its genesis in two United States Supreme Court cases dealing with the practice of patronage, i.e., the discharge by a public official of an employee who does not share the official's political persuasion. (*Elrod v. Burns* (1976) 96 S.Ct. 2673; *Branti v. Finkel* (1980) 100 S.Ct. 1287.) *Elrod* held that patronage dismissals must be limited to policy-making positions. (*Elrod v. Burns*, *supra*, 96 S.Ct. at p. 2687.) *Branti* refined the test for assessing whether a public employee's dismissal based on party affiliation offends the First Amendment: "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular

position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, *supra*, 100 S.Ct. at p. 1295.) The Supreme Court has since held that "the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support . . . ." (*Rutan v. Republican Party of Illinois* (1990) 110 S.Ct. 2729, 2739.)

In *Branti*, two county assistant public defenders sought to enjoin the newly elected public defender from discharging them due to their Republican Party affiliation. The court acknowledged "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." (*Id.* at p. 1294.) But it found an assistant public defender was hired to represent individual citizens, which was akin to privately retained counsel, and to act independently of the government in the representation of his client. "Thus, whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns." (*Branti v. Finkel, Id.* at p. 1294.) But the court pointed out in a footnote: "This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty." (*Id.* at p. 1295, fn. 13.)

The Ninth Circuit found an at-will assistant district attorney to be a policymaker in *Fazio v. City and County of San Francisco* (9th Cir.1997) 125 F.3d 1328. Fazio was a Head Attorney in the homicide division of the district attorney's office. As such, he handled high profile cases and was often quoted by the media on matters of

general public interest as well as on matters being handled by the district attorney's office. When he decided to run against the incumbent district attorney, he was fired. The court relied on two out-of-circuit cases that held assistant district attorneys to be policymakers because their duties included the potential for making policy decisions. (*Mummau v. Ranck* (3d Cir.1982) 687 F.2d 9; *Livas v. Petka* (7th Cir.1983) 711 F.2d 798.)[3] It also considered factors gleaned from other cases: "vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders. *Hall v. Ford*, 856 F.2d 255, 262 (D.C.Cir.1988)." (*Fazio v. City and County of San Francisco*, *supra*, 125 F.3d at p. 1334.)

Shade's position as an Assistant District Attorney, in which she functioned as a member of Rackauckas' executive management staff, falls within the *Fazio* holding. This position was one of an elite group of close assistants, presumably policy-making, and was specifically subject to Rackauckas' unfettered discretion. Once Shade was demoted to Senior Deputy District Attorney, however, she returned to her merit employee status. Rackauckas presented no evidence regarding Shade's policymaker status in that position other than submitting the county's job description for a Senior Deputy District Attorney, which includes "confer[ring] with judges, probation officers and defense attorneys regarding court cases and policy, [and] [a]ssist[ing] with establishment of specific sectional policies and procedures for work of professional, office support, and investigative staff." In effect, Rackauckas is asking us to find that a Senior Deputy District Attorney is a policymaker as a matter of law. Because it is his burden to

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[3] The *Livas* court also observed that prosecutors "serve society as a whole" rather than individual clients. (*Id.* at p. 801.)

demonstrate an exception to the protections of the First Amendment (*Elrod v. Burns*, *supra*, 96 S.Ct. at p. 2687), he needs to have more than this to go on.[4]

DISPOSITION

The judgment of the superior court is reversed. The case is remanded with directions to enter a new judgment directing Rackauckas to reinstate Shade to the position of Senior Deputy District Attorney with assigned duties commensurate with her grade level, training and experience. Shade is entitled to costs of appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

O'LEARY, J.

[4] Shade contends her status as a merit employee precludes her from being a policymaker. There is support for this proposition in the concurring and dissenting opinion of Judge Fletcher in *Finkelstein v. Bergna* (9th Cir. 1991) 924 F.2d 1449. He opined, "If a public employer gives an employee a property interest in her employment, defining the relationship by statute or regulation, the disciplinary measures available to ensure loyalty are limited necessarily to enforcement in conformity with the agreed employment terms. The disciplinary measures available to enforce loyalty against an employee who has no property interest in her job obviously are much broader. Including persons within the *Elrod* exception for whom the public employer has deemed such disciplinary measures unnecessary does not promote the exception's purpose. Such an employer cannot meet *Branti*'s requirement that the employer demonstrate that the employee's political loyalty is necessary to effective job performance. [Citation.] The employer's employment policy instead conclusively demonstrates the opposite; the employer has found that the employee's functions do *not* require the loyalty implicated by *Elrod*." (*Id.* at p. 1456, conc. and dis. opn. of Fletcher, J.)